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IN THE

Supreme Court of the United States

October Term, 1968

MICHAEL ZAFFARANO,

Petitioner,

against

WALTER W. FITZPATRICK, Warden, Federal Detention Headquarters, New York, New York,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Eugene N. Barkin, counsel to the Bureau of Prisons addressed the "Sentencing Institute of the Ninth Circuit" in September, 1965 (reported in 39 F. R. D. 523 13

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review an order of the United States Court of Appeals for the Second Circuit dated and entered December 5, 1968 (404 F. 2d 474) which unanimously affirmed the order of the United States District Court for the Southern District of New York denying petitioner's petition for release from confinement upon a writ of habeas corpus (287 F. Supp. 87).

Grounds of Federal Jurisdiction

1. In interpreting the sentence imposed by Judge Carter on December 16, 1964, in the District Court for the Northern District of California, the Court below failed to apprehend that under Rule 35 F. R. Cr. P., said sentence commenced as of the date when the peti-

tioner was originally sentenced, July 28, 1959, so that at the time when the unlawful detention commenced (February 14, 1968) the 5-year sentence dated December 16, 1964 had been served in full.

2. Failure to apprehend that the 5-year sentence, if interpreted as commencing as of December 16, 1964, was illegally imposed because it provided for a term which was actually longer than the sentence for 7 years and 9 months which the California Court had ordered on December 21, 1961. The effect of so interpreting the sentence of December 16, 1964, was to penalize the petitioner for having taken appeals.

3. Failure to grant habeas corpus under the applicable statutes.

4. Petitioner has been deprived of his liberty without due process of law and has been denied equal protection of the laws in violation of the Fifth and Fourteenth Amendments.

5. The record of proceedings conducted by Judge Carter prior to the imposition of sentence on December 16, 1964, establishes that he was then performing an administrative rather than a judicial act. The intervention of the Bureau of Prisons in fixing said sentence constituted a surrender by the Court of its judicial function to the administrative officials.

Statutes Involved

Rule 35 Federal Rules of Criminal Procedure (Prior to 1966 Amendment).

"The court may correct an illegal sentence at any time. The court may reduce a sentence within 60 days after

the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari".

Title 18 U. S. C. Sec. 3568 (prior to 1960 and 1966 Amendments).

"The sentence of imprisonment of any person convicted of an offense in a court of the United States shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of said sentence.

"If any such person shall be committed to a jail or other place of detention to wait transportation to the place at which his sentence is to be served, his sentence shall commence to run from the date on which he is received at such jail or other place of detention.

"No sentence shall prescribe any other method of computing the term".

Note in U. S. C. A. relating to 1960 Amendment of Sec. 3568:

"Pub. L. 86-691 including credit for time in custody prior to the imposition of sentence in the catchline, and inserted proviso requiring the Attorney General to give any such person credit toward service of his sentence for any days spent in custody prior to the imposition of sentence by the sentencing court for want of bail set for the offense under which sentence was imposed where the statute requires the imposition of a minimum mandatory sentence".

Title 18 U. S. C. Sec. 4208, subd. (b)

"If the court desires more detailed information as a basis for determining the sentence to be imposed, the court

may commit the defendant to the custody of the Attorney General, which commitment shall be deemed to be for the maximum sentence of imprisonment prescribed by law, for a study as described in subsection (c) hereof. The results of such study, together with any recommendations which the Director of the Bureau of Prisons believes would be helpful in determining the disposition of the case, shall be furnished to the court within three months unless the court grants time, not to exceed an additional three months, for further study. After receiving such reports and recommendations, the court may in its discretion: (1) Place the prisoner on probation as authorized by section 3651 of this title, or (2) affirm the sentence of imprisonment originally imposed, or reduce the sentence of imprisonment, and commit the offender under any applicable provision of law. The term of the sentence shall run from date of original commitment under this section."

Constitutional Provisions Involved

Due process clause and equal protection of the laws clause of the Fifth and Fourteenth Amendments.

Article II of the Constitution which defines the powers of the President and Article III which defines the powers of the Judiciary.

Questions Presented For Review

1. Under Title 18 U. S. C. 3568 which directs that a sentence shall commence to run from the date on which a person is received at the penitentiary, and further directs that no sentence shall provide any other method of computing the term, did the Court below commit error in interpreting Judge Carter's order dated December 16, 1964, as one which directed the 5-year sentence to commence running as of said date?

2. In enacting Title 18 U. S. C. sec. 4208 which provides that the term of such sentence shall run from the date of the original commitment, was Congress making said enactment consistent and uniform with existing law which requires that a superseding sentence shall be effective as of the date of the original sentence?

3. Did the Court below apprehend that the resentencing by Judge Carter on December 16, 1964, was in substitution of the sentence imposed originally on July 28, 1959, said prior sentence having been set aside as illegal and subsequently, pursuant to Rule 35 F. R. Cr. P., having been corrected by the sentence dated December 16, 1964?

4. In considering an interim 10-year sentence which Judge Carter imposed on March 29, 1963 and later vacated, was the Court of Appeals under a misapprehension that said interim sentence was predicated on a new conviction?

5. Did the Court of Appeals fail to recognize that all of the proceedings in this case followed the one conviction which was adjudged on July 28, 1959, so that in logic and law there could be only one sentence based thereon, a sentence which commenced as of the date of said original conviction, even though such original sentence was corrected on several occasions pursuant to Rule 35?

6. In respect of the interim sentence which Judge Carter imposed on March 29, 1963, did the Court of Appeals apprehend that Judge Carter set same aside because it superseded a prior sentence of 7 years and 9 months which Judge Wollenberg had ordered on December 21, 1961, so that the 10-year sentence imposed by Judge Carter on March 21, 1963, illegally increased the petitioner's punishment?

7. By interpreting the 5-year sentence dated December 16, 1964 as one that was to commence running as of said date, and by determining that credits for time served theretofore were not applicable to said sentence, did the Court of Appeals in actuality increase petitioner's term beyond that of 7 years and 9 months which had been ordered on December 21, 1961?

8. Did the Court below commit error by rejecting petitioner's contentions that under Rule 35 the 5-year term was to commence running as of the date of the original sentence and that all credits earned since July 28, 1959 were to be applied thereto, with the result that on February 14, 1968, said 5-year term had been served in full?

9. Was Judge Carter's intention in imposing said 5-year sentence, as set forth in the proceedings of December 1, 1964, entitled to any weight in view of the fact that neither the oral sentence, nor the written judgment, provided the effective date of its commencement, and in view of the fact that said proceedings constituted the performance of an administrative rather than a judicial function?

10. Were petitioner's rights prejudiced by reason of Judge Carter's surrender of his judicial power to the administrative officials of the Bureau of Prisons?

Statement of Facts

1. Petitioner was originally sentenced on July 28, 1959 by the District Court for the Northern District of California, Goodman, J., for a term of ten years, following his plea of guilty to the charge of transporting in interstate commerce travellers' checks stolen from the American Express Company.

2. After having served 2 years, 3 months, and 2 days of said 10-year sentence, petitioner moved in the California Court before Judge Wollenberg to vacate said judgment on the ground that he had been denied allocution. Said motion was granted in an order dated October 25, 1961 and the original sentence was set aside.

3. On October 30, 1961, Judge Wollenberg entered a further order which denied, without a hearing, petitioner's application to withdraw his guilty plea, and which then sentenced him to ten years commencing from the date of the original sentence. Petitioner took an appeal therefrom to the Ninth Circuit.

4. On December 21, 1961, while said appeal was pending, Judge Wollenberg, on his own motion, entered a further order sentencing the petitioner to a term of 7 years and 9 months. (The decision of the Court of Appeals failed to take note of the term of said sentence).

5. The Ninth Circuit reversed Judge Wollenberg's order dated October 30, 1961, on the ground that the District Court erred in denying petitioner's motion to withdraw his guilty plea without giving him a hearing. The case was remanded to the District Court to determine, after a hearing, whether a new trial was warranted; and if not, to impose sentence (*Zaffarano* v. *United States* (9th Cir. 1962) .306 F. 2d 707).

6. Petitioner's motion to withdraw his plea then came on before Judge Carter who denied same in a judgment dated March 29, 1963. Said judgment and order also sentenced the petitioner to a 10-year term.

7. Petitioner then appealed to the Ninth Circuit from the judgment which denied his motion to withdraw his

plea; and the Court of Appeals affirmed same (*Zaffarano* v. *United States,* (9th Cir. 1964) 330 F. 2d 114, Cert. Den. 379 U. S. 825).

8. Following said affirmance, Judge Carter conducted a hearing on December 1, 1964, the minutes of which are included in the Appendix to petitioner's Brief, submitted herewith. After said hearing, Judge Carter entered his judgment and order dated December 16, 1964, which is the sentence involved in the present appeal. Said order revoked Judge Carter's prior order fixing a 10-year sentence, which he held illegal, and then sentenced the petitioner to a term of five years. Said 5-year sentence fixed no date for the commencement thereof. However, it granted a stay of execution until January 5, 1965, on which date the petitioner was directed to surrender in the Southern District of New York.

9. After the petitioner was returned to prison, he made an application before Judge Carter for a reduction of said sentence, which was denied in an order dated April 15, 1965.

10. In October, 1965, after petitioner had served ten months of his 5-year sentence, he petitioned for habeas corpus in the District Court for the Northern District of Georgia, contending that all of the time served since the original commitment on July 28, 1959, was to be applied against said 5-year sentence, and that upon said application the 5-year sentence had been served in full, entitling him to release from custody. Said petition was denied; and the order of denial was affirmed by the Fifth Circuit (*Zaffarano* v. *Blackwell,* (5th Cir. 1967) 383 F. 2d 719.

11. Petitioner was paroled on July 22, 1966. However he was again taken into custody on February 14, 1968 for violation of said parol.

12. On March 3, 1968, petitioner applied for habeas corpus in the District Court for the Southern District of New York, contending that under Rule 35 F. R. Cr. P. the 5-year sentence became effective as of the date of the original sentencing and that accordingly said sentence had been served in full. Petitioner's application was denied in an order of Judge Weinfeld dated Jul. 22, 1968 (*Zaffarano* v. *Fitzpatrick,* 287 F. Supp. 87).

13. The order of Judge Weinfeld was unanimously affirmed by the Second Circuit in an order dated December 5, 1968 (*Zaffarano* v. *Fitzpatrick,* 404 F. 2d 474).

Proceedings Following Said Affirmance:

Petitioner contended on the appeal that the 5-year sentence imposed by Judge Carter was perfectly legal and should be enforced by declaring it effective as of the date of the original conviction. When confronted by three decisions holding that the sentence should not be so interpreted, the petitioner brought on a new application before Judge Carter in the District Court for the Northern District of California to vacate said 5-year sentence and thereupon impose the sentence which Judge Wollenberg had ordered on December 21, 1961. Petitioner made said motion on December 11, 1968 returnable on December 23, 1968. He earnestly expected that the motion would be determined within the period allowed for applying for certiorari to review the decision of the Second Circuit and possibly render an appeal therefrom unnecessary.

However, a delay occurred in the disposition of said application, first because of the illness of Judge Carter and then because of the procrastination of the United States attorney. The government was granted one extension to file its answer until March 24, 1969 and a second extension until April 10, 1969. At the same time, peti-

tioner received two time extensions from this Court for filing the instant petition.

In the application now pending in California, petitioner has contended that the decision of the Court of Appeals for the Second Circuit has placed an interpretation on the 5-year sentence which in effect increases his punishment beyond the term of seven years and nine months as fixed by Judge Wollenberg on December 21, 1961.

Reasons for Granting The Writ

Petitioner contends that the decision of the Court of Appeals for the Second Circuit is erroneous, as are indeed the prior decisions of Judge Weinfeld and of the Court of Appeals for the Fifth Circuit.

There was a manifest misunderstanding on the part of all three Courts as to the precise nature of the presentence proceeding conducted by Judge Carter on December 1, 1964. In the case of the Fifth Circuit, such misunderstanding was excusable because it did not have the Record of said proceedings before it. Accordingly, the Fifth Circuit viewed the proceeding as one which the petitioner had initiated to procure a modification and reduction of the 10-year sentence which Judge Carter had imposed on March 29, 1963. Judge Weinfeld, with the Record before him, also referred to said proceeding as one for modification of the 1963 sentence and the reduction thereof. Such erroneous view of the proceeding was adhered to by the Second Circuit.

The fact is that no sooner had such hearing commenced than Judge Carter recognized the illegality of his order dated March 29, 1963, and stated *sua sponte* that he would promptly set same aside. The Second Circuit quoted one statement by Judge Carter in which he ascribed illegality to said 10-year sentence on the ground that it made provision for time served. The Court of Appeals neglected to

note the following statement of petitioner's counsel at said hearing (p. 11):

> "And incidentally, I'd like to clear up something which I think probably is just a matter of confusion, because Your Honor asked me whether this was an oral motion for modification. We brought to Your Honor's attention informally some months ago the problems that were created by the seven-year and nine-months sentence which had been imposed, since it really deprived the defendant of something substantially * * *"

It is somewhat surprising that the Second Circuit failed to discern the true ground for the illegality of said 10-year sentence dated March 29, 1963, in view of the strong position that said tribunal recently took in respect of a new sentence that increased the term of a prior sentence, thereby penalizing the prisoner for having prosecuted his appeal (*United States* v. *Coke* (2nd Cir. 1968) 404 F. 2d 836, citing *Patton* v. *North Carolina* (4th Cir. 1967) 381 F. 2d 636, cert. den. 390 U. S. 905).

Equally surprising is the fact that the Second Circuit viewed said 10-year sentence as having been imposed after a new conviction, whereas the fact is that the petitioner was convicted only once, and that the several sentences superseding the sentence imposed on the original conviction, were all in correction thereof, pursuant to Rule 35. Petitioner contended in the Court below that for the purpose of determining the commencement date of the 5-year sentence imposed on December 16, 1964, all of the interim sentences should be ignored. In such posture it becomes clear that the petitioner commenced to serve an illegal 10-year sentence on July 28, 1959, which, following its ultimate correction, become a 5-year sentence effective of the initial date of his incarceration. All credits applicable to the one conviction and to the one sentence, as corrected, should have been granted to the petitioner.

It is fundamental that a sentence commences to run from the date on which the defendant is received at the penitentiary; indeed the statute provides: "No sentence shall prescribe any other method of computing the term" (28 USC sec. 3568). The Congressional intent in enacting the bail reform statutes in 1960 and 1966 was to enforce the doctrine that a prisoner shall receive credit for all time served from the date he is first received at the penitentiary or jail. The Second Circuit did not apprehend the significance of the final sentence of Section 3568, as it applies to this case, and it failed to include that portion in its quotation of the statute.

The doctrine that a sentence corrected under Rule 35 speaks of the date of the original conviction was applied by the Second Circuit in its prior decisions and departed from in the instant case (*United States* v. *Chiarello,* 2nd Cir. 1954, 214 F. 2d 838; *United States* v. *Grabina,* 2nd Cir. 1962, 309 F. 2d 783, cert. den. 374 U. S. 836). Said rule has been firmly applied in other circuits (*Ruiz* v. *United States,* 3rd Cir. 1966, 365 F. 2d 500; *Davenport* v. *United States,* (D. C. Cir. 1965) 353 F. 2d 882).

The Second Circuit found support in *United States* v. *Morse,* (4th Cir. 1965) 344 F. 2d 27. One distinguishing feature that is immediately apparent is that the sentence in *Morse* actually fixed the commencement date of the 2-year term as of the date of the new sentence. That was not done in the 5-year sentence imposed by Judge Carter, which provides no commencement date. In *Morse,* the Fourth Circuit stated (344 F. 2d at page 30):

> "We are not dealing with a simple sentence of a sentence for two years. If no more appeared, the sentence would of course be computed from the date the prisoner commenced service of his sentence and any attempt to increase the term would be ineffective."

In the instant case the Second Circuit denied relief by concluding that the petitioner was seeking to obtain double credit. If that is the result of Judge Carter's sentence, petitioner should not be deprived thereof. It was the duty of the sentencing judge to impose a sentence "which should reveal with fair certainty the intent of the court and exclude any serious misapprehensions by those who execute them". (*United States* v. *Daugherty,* 269 U. S. 360, 46 S. Ct. 156, 70 L. Ed. 309). In *Benson* v. *United States* (5th Cir. 1964) 332 F. 2d 288, the Court stated:

> "Where there is no doubt or ambiguity it must be read in a light most favorable to the accused."

The documents set forth in petitioner's Appendix (108a-118a) reveal that the Bureau of Prisons was intimately involved in the sentencing imposed by Judge Carter. It knew that the possibility of double credit could eventuate by fixing a new sentence which would give consideration to credits earned.

The result which Judge Carter created by his sentencing in this case is one which the prison authorities are quite mindful of and which they have brought to the attention of the courts and the bar. Eugene N. Barkin, counsel to the Bureau of Prisons addressed the "Sentencing Institute of the Ninth Circuit" in September, 1965 (reported in 39 F. R. D. 523) and stated the following (p. 525):

> "* * * Therefore, if the court wants the defendant to serve the same length of time it initially imposed with the same credits, the new sentence should be the same length as the vacated sentence. If, however, the court is unaware of the fact that time is computed in the manner I indicated above or disagrees with this interpretation, and attempts

> to 'adjust' by reducing the final sentence by an amount equivalent to the time already spent in custody, at best confusion would result, and at worst, the intent of the court could be frustrated. If, for an example, a defendant had been in custody for two and a half years of a five year sentence at the time of vacation, and a new sentence of two and a half years is imposed, it could well be argued that the prisoner is entitled to immediate release from custody even though this is clearly not the court's intention."

The Ninth Circuit, which had the benefit of Mr. Barkin's warning, is now most careful on the subject of resentencing, in order to prevent the granting of double credit. In *Lee* v. *United States* (9th Cir. 1968) 400 F. 2d 185, 189, the Court stated:

> "The giving of credit is not a judicial act but is an administrative act, like credits for work or for good behavior. The credits apply against the sentence as imposed and cannot be implemented by tampering with the sentence itself, else the problem of double credit occurs."

The recent decision of the Ninth Circuit in *Lee* constitutes a criticism and rejection of the judicial computation of credit made by Judge Carter and the prison authorities in the pre-sentence hearing conducted on December 1, 1964. Petitioner claims that such activity was in violation of the Constitutional provisions for separation of powers. Sentencing is a judicial function which may not be surrendered to the administrative officials; nor is the problem of computation of credit a task to be performed by a judge.

In its anxiety to prevent a double credit, the Second Circuit did not recognize that it was in fact perpetuating

a more serious injustice. It interpreted an unambiguous 5-year term to be in actuality a 10-year term less credits accrued thereon. It failed to discern that by so interpreting the new sentence, it was approving a sentence longer in duration than the sentence of seven years and nine months which Judge Wollenberg had imposed on December 21, 1961. Whether consciously or not, the Court of Appeals determined that the petitioner must serve a longer sentence than the term imposed by Judge Wollenberg.

It is submitted that the questions submitted for review by the Supreme Court require a final adjudication for the benefit of the prisoner, the sentencing judge and the Bureau of Prisons. Uncertainty should be removed from that sphere of the criminal law. It has been shown that the decision of the Second Circuit is at variance with its own prior decisions and those of other circuits. The Ninth Circuit has already indicated that in imposing a new sentence a judge should not attempt to compute credits; that is the function of the administrative officials.

So far as this petitioner is concerned, the 5-year sentence, as interpreted, has become a 10-year sentence. He has been penalized thereby since the present sentence is longer than the 1961 sentence for nine years and seven months.

It is therefore respectfully urged that the order of affirmance of the United States Court of Appeals for the Second Circuit should be reversed, and to that end the writ prayed for herein should issue.

Respectfully submitted,

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Opinion of United States Court of Appeals For The Second Circuit

SMITH, *Circuit Judge*:

This is an appeal from a judgment of the United States District Court for the Southern District of New York, entered July 22, 1968, Edward Weinfeld, *J.*, denying appellant's petition for release from confinement in the Federal Detention Headquarters in the Southern District of New York upon a writ of habeas corpus. *Zaffarano* v. *Fitzpatrick*, 287 F. Supp. 87 (S. D. N. Y. 1968). Zaffarano's custody stems from his violation of the terms of his release on parole from service of a sentence imposed on Zaffarano's plea of guilty to a charge of interstate transportation of stolen securities. He alleges that his detention for violation of parole is unlawful because his 5-year sentence was fully served at the time he was released on parole, and that the parole board was without jurisdiction to charge him with a violation.

On July 28, 1959, Zaffarano was convicted of violating Title 18 U. S. C. §2314 upon his plea of guilty to one of three counts in Indictment Cr. No. 36677 in the United States District Court for the Northern District of California, namely that he knowingly and wilfully transported in interstate commerce a quantity of American Express Company travelers checks of a value of more than $5,000 which had been stolen on or about April 19, 1959. Chief Judge Louis E. Goodman sentenced Zaffarano to a term of imprisonment of ten years, a sentence which Zaffarano began immediately to serve.

On or about October 13, 1961, Zaffarano, while confined to the Federal Penitentiary at Atlanta, Georgia, moved that the California District Court vacate the judgment and sentence on the grounds that he had been denied the right

of allocution before imposition of sentence, as required by Fed. R. Crim. P. 32(a), 18 U. S. C. The motion was granted and the sentence vacated on October 25, 1961. At a hearing on October 30, 1961, Zaffarano exercised his right of allocution, stating that the inducement to his guilty plea was the promise of a lenient sentence by a government attorney, and moved to withdraw the plea of guilty on the ground that it was involuntary. Judge Wollenberg denied the oral motion without a hearing, and sentenced Zaffarano to ten years' imprisonment, with credit for time already served. On December 21, 1961, Judge Wollenberg, acting on his own motion, reconsidered and again denied Zaffarano's motion. On appeal, the Ninth Circuit reversed, holding that it was error to deny, without a hearing, Zaffarano's motion, and remanded the case with directions to hold a hearing on the motion and to reimpose sentence if the plea was properly entered or hold a new trial if it was not. *Zaffarano* v. *United States*, 306 F. 2d 707 (9th Cir. 1962).

On March 26, 1962, Zaffarano was released on bail. On March 29, 1963 Judge Carter, in the Northern District of California, found the plea to have been voluntarily entered, denied Zaffarano's motion to withdraw the plea of guilty, and sentenced Zaffarano to a ten year term, further providing:

> that the defendant receive credit for the time served, a period from July 28, 1959 to October 30, 1961 . . .

On April 6, 1964, the Ninth Circuit affirmed Judge Carter's decision and on October 12, 1964, the Supreme Court denied certiorari. *Zaffarano* v. *United States*, 330 F. 2d 114 (9th Cir.), cert. denied 379 U. S. 825 (1964).

On December 1, 1964, Zaffarano appeared before Judge Carter for surrender and made an oral application for

reduction of sentence pursuant to Rule 35, Fed. R. Crim. P. At a hearing on this date, Zaffarano's counsel maintained that since Zaffarano had not been legally sentenced by Judge Goodman, he was entitled to Judge Carter's independent opinion as to the appropriate sentence, considering his possibility for rehabilitation, culpability, etc.

Judge Carter, however, was chiefly concerned with the possible illegality of his March 29, 1963 sentence, in that a provision for credit for time served may not be made part of the formal sentence, but is rather to be given administratively by the Attorney General. As he stated at the hearing:

> I intend to modify the judgment, because the present form of the judgment, in my opinion, would take some interpretation and perhaps is an illegal sentence, and I want to, to the extent that I can, remove from the record any arguments about the extent of the sentence. I want to restore to the defendant, as nearly as possible, and I want to say it is not—I don't think it is possible to put it in exactly the same position, but I can put it in substantially the same position but giving him certain time credits, and then the sentence that I will fix will be the balance of the ten-year sentence after allowing credit for the mandatory good time credits that he's earned, for meritorious time and credits that he's earned, and then the difference between the mandatory good time credits he would have earned and the mandatory good time credits he will earn . . .

Thereafter on December 16, 1964, Judge Carter entered a judgment and order revoking the judgment and order of conviction of March 29, 1963, and imposed a new sentence of imprisonment for five years, pursuant to Rule 35, Fed.

R. Crim. P., and providing that Zaffarano should be eligible for parole after serving eight months of his sentence pursuant to 18 U. S. C. §4208(a)(1). Judge Carter further granted a stay of execution until 12:00 noon on January 4, 1965, due to the wish of the appellant to spend the holidays with his family, and also because the Supreme Court's mandate had apparently not been received. Zaffarano took no appeal from this order and on January 4, 1965, surrendered to the Attorney General to begin service of sentence.

On April 15, 1965, Judge Carter denied a further motion to reduce the sentence imposed December 16, 1964.

After serving ten months of his sentence in the Federal Penitentiary at Atlanta, Georgia, Zaffarano in October, 1965, petitioned for habeas corpus in the District Court for the Northern District of Georgia on the grounds urged here, namely that he was entitled to credit for the two years, two months he had served under the original ten-year sentence which, added to the time served under the second sentence plus good time credits, compelled his discharge. The District Court, Hooper, *Judge,* denied his application without a hearing. While an appeal from this decision was pending, on July 22, 1966 Zaffarano was released on parole.

The Fifth Circuit affirmed the denial of the writ, stating that under Rule 35 the District Court could have either entered a new sentence as from the date of conviction, or entered a modification of the earlier sentence specifying the remainder of the time to be served with parole or probation provisions. Chief Judge Brown held that the modification or reduction of a sentence under Rule 35 is within the discretion of the Trial Court, and that Zaffarano's claim that he is entitled to immediate release was

contrary to the intent of the Court to impose a reduced sentence as from January 4, 1965:

> [W]e think the intent of the District Court is plain. The resentencing order, whether that was the purpose or not, gives effect to the time that Zaffarano had already served under the original sentence. But more than that, the Court sought to reduce the sentence by providing for parole consideration at an earlier date than under normal statutory procedures. 18 U. S. C. §4202. Most important, the order provided that service of the sentence should commence January 4, 1965, a provision completely inconsistent with the argument that the reduced sentence was in place of the original ten-year sentence.

Zaffarano v. *Blackwell*, 383 F. 2d 719, 722 (5th Cir. 1967). The Court also noted that Zaffarano would not be required to serve more time than the statutory maximum for the offense, nor more time than he would have under the original sentence of ten years, nor more than if no action to vacate or reduce the sentence had been taken.

On February 14, 1968, Zaffarano's parole was revoked and he was committed in the Southern District of New York for violation of his parole after being convicted in the New York City Criminal Court of trafficking in pornography.

Zaffarano instituted the present petition for habeas corpus on March 5, 1968 alleging that he had already served the time required by the five year sentence of December 1964, and that his prior application for habeas corpus in the Northern District of Georgia, and on appeal in the Fifth Circuit, was denied without benefit of material records from the Northern District of California.

The District Court, Weinfeld, *Judge*, denied the application, stating that it was clear from the record that Zaffarano had already received credit for time served and statutory good time and other credits. Responding to the argument that sentences are to be computed from the date of original custody, regardless of the intent of the sentencing judge, the District Court stated:

> [Petitioner's] basic claim is that the computation of allowances for time served and good-time credits is not a judicial function, but is a nondiscretionary function within the sole province of the Attorney General, and once sentence is imposed, the allowances become mandatory. . . . Thus petitioner seeks double credit. To this he is not entitled. . . .
>
> By voiding the ten-year sentence, Judge Carter wrote on tabula rasa in imposing the five-year term, and petitioner started to serve that sentence from scratch. It is beyond peradventure that when defendant commenced his five-year term, he had already received full credit for time served and all allowances; he is not entitled to another credit. Petitioner is seeking to resurrect the vacated ten year sentence to obtain the benefit of its provision for credit, even though expressly revoked.

Zaffarano v. *Fitzpatrick*, 287 F. Supp. 87, 89-90 (S. D. N. Y. 1968).

Although we might well be able to rest decision on the prior determination by the Fifth Circuit, we have engaged in an independent review, find no error and affirm the judgment.

I.

Appellee contends, at the outset, that the District Court was not the sentencing court, and that therefore under 28

U. S. C. §2255 and *Sobell* v. *Attorney General*, —— F. 2d —— (3rd Cir. 1968) the District Court was without jurisdiction to consider the application. Zaffarano should have applied for the writ in the Northern District of California which sentenced him, appellee continues, and having failed to do so cannot compel a district court unfamiliar with the proceedings and without convenient access to the records to interpret the myriad orders.

Section 2255, 18 U. S. C. provides as follows:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence. * * *
>
> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

There is merit to the argument that under 18 U. S. C. §2255 an attack on a sentence, or an attempt to modify a sentence, should in the first instance be made to the sentencing court, whether or not we term the requirement strictly jurisdictional.

However, since Zaffarano has made an additional claim, namely that his sentence has been served, and that his present custody by federal officials is therefore unlawful, the District Court had jurisdiction and was correct in passing on Zaffarano's application. The writ of habeas corpus is an incident of the federal judicial power conferred by the Constitution which provides in Article 1, §9, cl. 2:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

The primary historic use of the writ of habeas corpus, embodied in the Constitution, as well as 28 U. S. C. §2241, is to test the legality of a prisoner's current detention, whatever its other functions. *Walker* v. *Wainwright*, 390 U. S. 335, 336 (1968). Since in part at least the prisoner's attack on the legality of his detention is not an attack on the sentence imposed, but based on a claim that the sentence has been fully carried out, it is to that extent outside the literal terms of Sec. 2255, and habeas corpus may lie.

II.

Petitioner relies upon Title 18 U. S. C. §3568 and §4208(b) to establish the proposition that any sentencing, or modification of sentence, commences to run from the date of the original commitment, and argues that these sections are applicable to a resentencing under Rule 35. Furthermore, petitioner argues, in computing the time to be credited Zaffarano, the Court was performing an administrative function primarily vested in the Attorney General by 18 U. S. C. §§4001, 4161, and 4162, and that therefore there is no reason or basis to search the record to determine the Court's intention.

Section 4208(b), 18 U. S. C., does not lay down a general rule as to the form of sentencing, but instead deals with the procedure when a prisoner is initially committed for study and resentenced thereafter, when the court feels that the sentence should be reduced.

Section 3568, Title 18 provides as follows:

> The sentence of imprisonment of any prisoner convicted of an offense shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of such sentence. The Attorney General shall give any such person credit toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed.

The portion of the statute providing that the Attorney General shall give any sentenced person credit for pre-sentence custody was effective in 1966, Pub. L. 89-465, June 22, 1966, 80 Stat. 217, and is not retroactive. *United States* v. *Abele,* 269 F. Supp. 29, 31 (E. D. La. 1967); 80 Stat. 217, §6. Thus in December 1964, when Judge Carter revoked his judgment and sentence of March 29, 1963, and imposed a new sentence of five years to commence on January 4, 1965, Zaffarano was not, by the literal terms of Section 3568, as it was then in force, entitled to credit for pre-sentence custody, as an administrative matter by the Attorney General.

Moreover, Judge Carter, in imposing the five-year sentence clearly gave Zaffarano not only credit for pre-sentence custody, but liberal credit for mandatory good time and other credits, as both the District Court and the Fifth Circuit have noted.

Section 3568, Title 18, has not, finally, been applied to defeat the plain intention of the sentencing judge. In

United States v. *Morse*, 344 F. 2d 27 (4th Cir. 1965), a case similar to the one before this court, defendant had served part of an original five-year sentence, when he succeeded in vacating the sentence on the grounds that he was not present in court at the time. In reimposing sentence, with defendant present, the Court was concerned that the prisoner obtain credit for good-time allowances earned while serving the prior invalid sentence, and its new sentence was "two years, dating from today, under the provisions of 4208(a)." The prisoner demanded immediate release, maintaining that the words "from today" were rendered inoperative by 18 U. S. C. §4208(b) and §3568, and that he had already served two years from the date of his original commitment. The Fourth Circuit rejected this contention, stating at 30:

> [W]e should carry out the *true intention* of the sentencing judge as this may be gathered from what he said at the time of sentencing. Indisputably that intention in the present case was that the defendant should serve a term of five years from the date of his original commitment, with normal credits for good behavior. The Judge deviated from the usual formula only out of consideration for the defendant to protect him against the possibility that the good time previously earned on an invalid sentence might otherwise be lost. [Emphasis added.]

The District Court was correct in concluding that petitioner is seeking to obtain double credit for time previously served and good-time allowances, and that his application cannot be sustained upon a plain reading of the December 16, 1964 judgment and order.

The judgment dismissing the application is affirmed.

Opinion of United States District Court Southern District of New York

EDWARD WEINFELD, D. J.

Petitioner, confined to the Federal House of Detention pursuant to a warrant of arrest for violation of parole, seeks his release upon a writ of habeas corpus. He alleges his detention is illegal because his sentence was fully served and he was entitled to a mandatory unconditional release, so that the Parole Board was without jurisdiction to charge him with any violation of parole conditions or to issue any warrant for his arrest for any alleged violation.[1]

The starting point of petitioner's claim is a judgment of conviction entered on July 28, 1959 in the United States District Court for the Southern District of California, following his plea of guilty to interstate transportation of stolen securities. He was sentenced to a term of ten years by Chief Judge Louis Goodman.

More than two years later, in October 1961, while confined to Atlanta Penitentiary, he moved to vacate the judgment of conviction upon the ground that he had been denied the right of allocution. He was returned to the District Court where, on October 25, 1961, his motion was granted and the judgment vacated by District Judge Wollenberg. On October 30, 1961 petitioner appeared for sentence and, afforded his right of allocution, asserted that his plea of guilty was not voluntary, and orally moved for its withdrawal. The motion was denied without a hearing and petitioner was sentenced to a term of ten years by Judge Wollenberg.

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[1] Subsequent to the submission of briefs following argument of this application, the court was advised that after a hearing petitioner's parole had been revoked.

Upon appeal, the Court of Appeals held the denial of the motion without a hearing was error, vacated the judgment of conviction of October 30, 1961, under which the second ten-year sentence was imposed, and remanded the case to the District Court for a hearing with instructions to reimpose sentence if the motion were denied or, alternatively, to grant a new trial if it were granted.[2] A hearing as directed was conducted before District Judge Carter on February 6 and 7, 1963, who denied the motion and imposed a ten-year sentence, upon which judgment was entered on March 29, 1963. The judgment also "ordered" that defendant receive credit for the time served at the Atlanta Penitentiary from July 28, 1959 to October 30, 1961, two years, three months and two days. The petitioner appealed from the denial of his motion for the withdrawal of the guilty plea, pending which he was continued on bail previously imposed.[3] The order of the District Court denying the withdrawal motion was affirmed.[4]

On December 1, 1964, when petitioner was to surrender to the United States Marshal to commence service of his sentence, he appeared, together with privately retained counsel, before Judge Carter and applied for a reduction of sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure. The hearing centered principally about credits for time served and statutory good time allowances. The transcript of the hearing makes it abund-

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[2] *Zaffarano* v. *United States*, 306 F. 2d 707 (9th Cir. 1962).

[3] Upon his first appeal from the denial by Judge Wollenberg of his motion to withdraw his guilty plea petitioner elected not to commence service of his sentence pending appeal, under former Federal Rules of Criminal Procedure, 38(a)(2). However, on March 28, 1962, he was released on bail pending appeal.

[4] *Zaffarano* v. *United States*, 330 F. 2d 114 (9th Cir.), cert. denied. 379 U. S. 825 (1964).

antly clear that Judge Carter evinced a purpose to impose a ten-year sentence but which in end result, as formulated, would give the petitioner, in addition to credit for time actually served, the full benefit of all available credits a prisoner serving a ten-year sentence might have been allowed, whether or not in fact he had earned all of them.[5] In any event, upon the conclusion of the hearing Judge Carter imposed a sentence of five years and provided for petitioner's eligibility for parole after eight months pursuant to section 4208 (a) (1) of Title 18. The judgment to this effect, referred to hereafter, was entered on December, 16, 1964, and, among other matters, revoked and set aside the earlier judgment of March 29, 1963. Petitioner, upon his surrender in January 1965, was committed to the Federal Penitentiary at Atlanta, Georgia. In October 1965, after serving only ten months of his sentence, he instituted a habeas corpus proceeding seeking his release upon the grounds here urged. He contended that he was entitled to credit for the two years, three months and two days he had served under the original ten-year sentence which, if added to the the time served under the five-year sentence, plus good time credits, compelled his unconditional discharge. Thus, essentially, the claim was and remains that he is entitled to credit for time served under the first sentence. His application for a writ of habeas corpus was denied without a hearing. The Fifth Circuit Court of Appeals affirmed the denial of petitioner's application and rejected his contention.[6] That court observed that while the record before it was "scant regarding the facts of the hearing on reduction of sentence," it was satisfied that the intent of the District Court with respect to the

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[5] Record, pp. 6, 8, passim.

[6] *Zaffarano* v. *Blackwell*, 383 F. 2d 719 (5th Cir. 1967).

five-year sentence was to give "effect to the time that Zaffarano had already served under the original sentence". It also noted, in distinguishing *Short* v. *United States*,[7] relied upon by petitioner, that under no circumstance will he be required to serve more time than he would have served under the original sentence of ten years, nor will he serve more time than the statutory maximum for the offense.

There is no need here to indulge in any presumption, conclusive or otherwise, as to whether the sentencing court credited the defendant with the time he had already served.[8] The transcript of the hearing on petitioner's motion for reduction leaves no room to doubt that when the District Court imposed the five-year sentence in December 1964, it considered and took into account the time he had served under the original sentence and generously allowed for statutory good time and other credits.

Petitioner readily concedes Judge Carter intended to give him credit for time served and other allowances, but asserts the judge erred in reducing the sentence to five years—that he should have imposed a longer sentence so that the reduction would follow as an administrative matter. His basic claim is that the computation of allowances for time served and good time credits is not a judicial function, but is a nondiscretionary function within the sole province of the Attorney General, and once sentence is imposed, the allowances become mandatory. Thus, the argument continues, however well-intended Judge Carter

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[7] 344 F. 2d 550 (D. C. Cir. 1965).

[8] See *Huber* v. *United States*, 390 F. 2d 544 (5th Cir. 1968); *Bryans* v. *Blackwell*, 387 F. 2d 764 (5th Cir. 1967); *Dunn* v. *United States*, 376 F. 2d 191 (4th Cir. 1967); *Stapf* v. *United States*, 367 F. 2d 326 (D. C. Cir. 1966).

was in taking into account and crediting petitioner with the time he had served, he exceeded his authority; that once the five-year term was imposed, and notwithstanding that the court had already credited petitioner for time already served, the Attorney General, as an administrative matter, was required, upon petitioner's commencement of sentence, to deduct therefrom the time he had served under the ten-year sentence. Thus petitioner seeks double credit. To this he is not entitled. The five-year sentence was imposed on petitioner's application for a reduction, made pursuant to Rule 35 of the Federal Rules of Criminal Procedure, and, as noted, Judge Carter's purpose was to impose a ten-year sentence, but to give petitioner credit for the time served, as well as for other items.[9] He achieved his purpose by the imposition of the five-year term, which took into account the various allowances. It is evident that he questioned the validity of the judgment of March 29, 1963, "ordering" that petitioner be given credit allowances, and corrected it in passing upon petitioner's application.[10]

It is significant that the Judgment and Order of Commitment of December 16, 1964, which granted defendant's motion for modification, revoked and set aside the earlier judgment of March 29, 1963, which imposed the ten-year sentence; also specifically revoked and set aside was the provision which "ordered" that petitioner receive credit

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[9] Petitioner, in his appeal to the Fifth Circuit Court of Appeals, admitted as much: ". . . Judge Carter, we admit, deemed that by imposing a new five year sentence he would be coming approximately close to carrying out the original 'intent' of an overall ten-year sentence". Appellant's supplemental brief, filed November 16, 1966, p. 12.

[10] Transcript, December 1, 1964, pp. 5, 11.

for time served, in apparent recognition of lack of authority to so "order."[11] By voiding the ten-year sentence, Judge Carter wrote on tabala rasa in imposing the five-year term, and petitioner started to serve that sentence from scratch. It is beyond peradventure that when defendant commenced his five-year term, he had already received full credit for time served and all allowances; he is not entitled to another credit. Petitioner is seeking to resurrect the vacated ten-year sentence to obtain the benefit of its provision for credit, even though expressly revoked.

The facts here presented require no different determination from that reached by the Fifth Circuit. The additional record submitted on this application underscores the correctness of its determination. The petition for an issuance of a writ of habeas corpus is denied.

Dated: New York, N. Y.
July 22, 1968

EDWARD WEINFELD
United States District Judge

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[11] Cf. *McNally* v. *Hill*, 293 U. S. 131 (1934); *Sawyer* v. *Clark*, 386 F. 2d 633 (D. C. Cir. 1967); *Meyers* v. *Hunter*, 160 F. 2d 344 (10th Cir.), cert. denied, 331 U. S. 852 (1947). Petitioner's counsel himself states: ". . . the law is rather clear that federal sentencing Judges may not legally include provisions of credit for time served in making formal pronouncement of sentence." Petitioner's supplemental memorandum, p. 5.